United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7386

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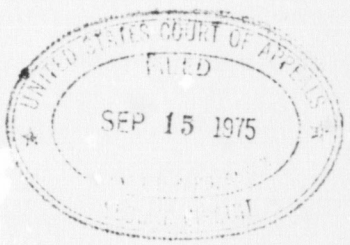

IN RE MASTER KEY ANTITRUST LITIGATION

(All Cases)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF DEFENDANTS-APPELLANTS

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PRELIMINARY STATEMENT

This litigation involves 16 class actions brought by public bodies and private owners and builder-owners under § 4 of the Clayton Act[1] against four manufacturers of builders hardware, Emhart Corporation, Sargent & Company, Eaton Yale & Towne, Inc. (now Eaton Corporation) and Ilco Corporation, for treble damages for violation of the Sherman Act.[2]

---

1. 15 U.S. Code § 15
2. 15 U.S. Code § 1

The decision appealed from was rendered by District Judge M. Joseph Blumenfeld and is unofficially reported at 1975 Trade Cases, ¶ 60,377. A later decision, directly related, has not been reported and is included in the Joint Appendix (Jt. App.) at pp. 164a-169a.

STATEMENT OF THE ISSUE

Did the District Court in multidistrict antitrust treble damage litigation err in certifying national and state-wide classes, in transferring all actions to the District of Connecticut and in consolidating all cases for trial only as to the issue of "liability" where the Court held that such "liability" could be established by a generalized showing of injury rather than requiring proof of particularized impact on each plaintiff of the defendants' alleged illegal acts?

STATEMENT OF THE CASE

The Proceedings Below

The litigation was commenced in February, 1970, by the filing of two actions in the Eastern District of Pennsylvania, City of Philadelphia, et al. v. Emhart Corp., et al. (Civil Action No. 70-494) and Amherst Leasing Corp. v. Emhart Corp., et al. (Civil Action No. 70-494). In each of these actions, plaintiff alleged the existence of interrelated conspiracies among the four

defendant-manufacturers and among and between each defendant and its respective co-conspirator-distributors to impose customer and territorial restrictions, to restrict bidding on building construction projects to the distributor who prepared the builders hardware specification and to restrict bidding on extensions of master key systems for building construction projects to the distributor who supplied the builders hardware for the initial project. The alleged result of these conspiracies was the elimination of interbrand and intrabrand competition and the fixing, stabilization and maintenance of prices at non-competitive levels.

On June 23, 1970, Judge Wood entered a conditional order that each of these actions would "be allowed to proceed" as a class action, specifically reserving "all our powers under Rule 23(c)(1) to alter our order or deny class treatment at any time". City of Philadelphia, et al. v. Emhart Corp., et al. (E.D. Pa. 1970) 50 F.R.D. 232, 236. The tentative nature of that order was thereafter acknowledged by Judge Wood in City of Philadelphia, et al. v. Emhart Corp., et al. (E.D. Pa. 1970) 317 Fed. Supp. 1320, 1321.

Within a year of the filing of Philadelphia and Amherst, seven similar actions were filed in New York, Florida and Illinois. The actions filed in the Northern District of Illinois by Connecticut, Indiana and Pennsylvania were transferred on defendants' motions to the District of Connecticut for all purposes, pursuant to 28 U.S. Code § 1404(a), in November and December 1970.

On January 14, 1971, the Judicial Panel on Multidistrict Litigation ordered that all related cases then pending be transferred to the District of Connecticut for consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. In re Master Key Antitrust Litigation (J.P.M.L. 1971) 320 F. Supp. 1404. Subsequent "tag-along" actions were similarly transferred pursuant to Rule 12 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation. (53 F.R.D. 119)

On January 16, 1973, plaintiffs moved in all pending cases for a "class action order". Defendants opposed the issuance of such order and moved for summary judgment against all public body plaintiffs on the ground that such plaintiffs lacked standing to assert claims for damages by virtue of the insurmountable problems of proof engendered by their status as remote claimants (citing inter alia, Hanover Shoe, Inc. v. United Shoe Machinery Corp. (1968) 392 U.S. 481 and Mangano v. American Radiator and Standard Sanitary Corp. (C.A. 3 1971) 438 F.2d 1187). Defendants' summary judgment motion was denied in a ruling filed August 23, 1973, In re Master Key Antitrust Litigation (D. Conn. 1973) 1973-2 Trade Cases, ¶ 74,680, in which Judge Blumenfeld held that the problems of proof were not (p. 94,982) "indubitably insurmountable" and that there existed genuine questions of fact relating to the "pass-on" issue asserted by defendants (p. 94,981).

In the course of ruling on defendants' motion for summary judgment, the court noted (p. 94,979, footnote 6):

> "Insuperable problems of class action management might make pretrial dismissal of certain claims appropriate. (citation omitted) But no class action issue is before the court on this motion."

At the time of the rulings complained of herein, the litigation consisted of the following actions:[3]

Plaintiff	District Where Pending
Amherst Leasing Corp.	E.D. Pa.
California	C.D. Cal.
Connecticut	Conn. (Transferred from N.D. Ill. under § 1404(a))
Florida	S.D. Fla.
Illinois	N.D. Ill.
Indiana	Conn. (Transferred from N.D. Ill. under § 1404(a))
Kansas	Kansas
Michigan	E.D. Pa. (Intervened in City of Phila. case)
Minnesota	E.D. Pa. (Intervened in City of Phila. case)
New Jersey	New Jersey

3. Since the appeal was lodged in this Court, the State of Colorado has filed its complaint in the District Court for the District of Connecticut.

Plaintiff	District Where Pending
New York	S.D. N.Y.
City of New York	S.D. N.Y.
Pennsylvania [3]	Conn. (Transferred from N.D. Ill. under § 1404(a))
City of Philadelphia	E.D. Pa.
Sturdy Homes	E.D. Mich.[4]
Ohio	S.D. Ohio
West Virginia	N.D. Ill.
Wisconsin	E.D. Pa. (Intervened in City of Phila. case)

Thereafter, the following proceedings took place:

1. Plaintiffs moved for certification of the following class actions:

   (a) 14 state-wide class actions with each state attorney general as the class representative;

   (b) a national class of the remaining states and all of their county and local governmant and governmental authorities to be represented by the City of Philadelphia;

   (c) a national class of owners and builder-owners of hotels, motels, apartments and office buildings to be represented by Amherst Leasing Corp.

2. Plaintiffs moved to transfer all of the pending cases (except State of Florida

4. This case is not filed as a class action but as an action jointly brought by 541 plaintiffs.

and City of New York) to the District of Connecticut for all purposes pursuant to 28 U.S. Code § 1404(a).

3. Plaintiffs moved to consolidate for trial all cases so transferred, pursuant to Rule 42(a).

4. Plaintiffs moved for a separate trial of the issue of "liability" alone in all transferred and consolidated actions, pursuant to Rule 42(b).

Defendants opposed certification of the two national classes, opposed transfer of the "non-Connecticut" cases, opposed consolidation and opposed the separation for trial of the "liability" issue. On May 27, 1975, in a memorandum entitled "Ruling on Pending Motions", the District Court granted each of plaintiff's motions. (D. Conn. 1975) 1975 Trade Cases, ¶ 60,377. [Jt. App. pp. 152a-163a]

An appeal from the May 27 order was lodged in this Court on June 25, 1975. Plaintiffs' motion to dismiss the appeal was denied at the hearing on September 2, 1975.

Defendants earlier had requested the District Court to certify, pursuant to 28 U.S.C. 1292(b), the issue of the requirement of individualized impact and the issue of the right to jury trial on all issues. Acknowledging that defendants' first question is "controlling" within the meaning of § 1292(b) [Jt. App. p. 166a] and further acknowledging that "there is substantial ground for difference of opinion" [Jt. App. p. 166a], the lower court nevertheless, in its ruling entered August 11, 1975, refused

certification on the ground that an immediate appeal would not materially advance the ultimate termination of the litigation [Jt. App. p. 167a]

Disposition in the Court Below

The precise issues presented for review arise not from any single action taken by the District Court but rather from the totality of the independent and interdependent actions, coupled with the District Court's clearly expressed intention to deny defendants the right to require that plaintiffs prove---as an essential element of antitrust liability---that the alleged conspiratorial restrictions caused particularized impact to each plaintiff which resulted in damage to such plaintiffs. Thus, the sum of the District Court's rulings declaring national classes and consolidating all cases for trial on "liability" alone---as "liability" is circumscribed by the District Court---has the extremely prejudicial effect of not only reversing long established antitrust law in this Circuit but also denying defendants their constitutionally guaranteed right to jury trial.

The disposition in the court below---complained of here by defendants---is the certification of national and state-wide classes, the transfer of actions pending in other districts, the consolidation for trial of all such actions and the separation of the issues of liability and damages, with the "liability" to be

established by a generalized showing of injury instead of proof of particularized impact on each plaintiff.

Statement of Facts[5]

The City of Philadelphia filed its Complaint [Jt. App. p. 2a] on behalf of a class of "all states, counties and local governments and governmental authorities and agencies in the United States who have purchased locks with master key systems from one or more of the defendants and/or their co-conspirators."

Amherst Leasing Corporation filed its Complaint [Jt. App. p. 13a] on behalf of a class of "owners and builder-owners of apartments, hotels, motels and office buildings throughout the United States who have purchased locks with master key systems manufactured by one or more of the defendants and/or their co-conspirators".

The State of Michigan filed its Complaint [Jt. App. pp. 525a-526a] on behalf of a class of "itself and its state departments, divisions and agencies and on behalf of all counties, municipalities, school districts and political subdivisions organized under state authority which have * * * purchased or paid for, directly or in-

5. In preparing the Statement of Fact the complaints in City of Philadelphia, alleging a national class of governmental entities, Amherst Leasing, alleging a national class of owners and builder-owners, and State of Michigan, alleging a state class of governmental entities, have been utilized as typical of all complaints.

directly, builders hardware and master key systems * * * from one or more of the defendants during the period in suit, and have sustained damages as a result of the combination and conspiracy and violations of the antitrust laws herein alleged."

Philadelphia and Amherst allege that defendants manufacture master key systems under various brand names and sell them to distributors located throughout the United States. The distributors purchase the products and resell them for use in hospitals, colleges, schools, hotels, apartments, office buildings and similar buildings.

Defendants are mindful of the admonitions of this Court that review of orders of the District Court under § 1291 must be separable from the merits. This point was discussed in the "Brief of Defendants-Appellants in Opposition to Motion to Dismiss Appeal" at pp. 30-32 and pp. 42-44. Defendants by their detailed statement of facts do not seek review of an order which would require this Court to make inquiries which "would take the court in to the merits of the case," as warned against by Judge Waterman, the Court's spokesman, writing for Judges Friendly and Gurfein in Parkinson v. April Industries, Inc. (C.A. 2 1975) F.2d (Nos. 1288,520) pp. 4465-4485.

Rather, defendants by the following statement of facts wish to lay before this Court the statements as to marketing and

distribution of builders hardware which were invited by Judge Blumenfeld in connection with his consideration of defendants' motion for summary judgment. The separate statements [Jt. App. p. 47a et seq.] with accompanying affidavits [Jt. App. pp. 32a et seq.; 57a et seq.] contain certain similarities in marketing and distribution methods and patterns and, to the extent these similarities can be generalized, the statements establish that:

1. Builders hardware is the hardware found on doors. [Jt. App. pp. 32a, 37a, 47a, 51a]

> Builders hardware, generally, means the hardware affixed to a door to control its function and consists of lock sets, latch sets, door holders, door closers, hinges, panic (or exit) devices and push and pull plates. Master key systems, composed of lock sets and cylinders specially keyed, control entry to various portions of a building or a group of buildings by means of master keys and change keys. Extensions of master key systems are additional locks in an addition to a building or in a new building, which are keyed into the original master key system. Defendants' brands of locksets include Corbin, Russwin, Sargent, Yale and Lockwood. There are many non-defendant manufacturers of builders hardware including lockset brands such as Schlage, Falcon and Arrow.

2. Manufacturers sell through authorized distributors and not to end users. [Jt. App. pp. 38a, 40a, 42a, 48a, 52a]

> No defendant-manufacturer sells builders hardware or master key systems to end users, i.e., the owners or occupiers of the buildings in which the hardware is installed. Each manufacturer sells builders hardware

principally to appointed distributors (also called contract hardware dealers) who purchase from the manufacturer at a net price (which is frequently discounted) and who resell at a mark-up determined by the individual dealer. All distributors also handle hardware products of non-defendant manufacturers. A manufacturer may also sell builders hardware to a stock or "shelf" hardware account who re-sells to retail hardware stores and a manufacturer may sell to an "original equipment manufacturer" which manufactures products such as doors, windows, cabinets, etc., into which the hardware is installed before sale. Some of this hardware sold through "shelf" or "OEM" accounts may, after various layers of resale transactions, eventually end up incorporated into an apartment, hotel, motel or office building.

3. Distributors usually deal locally with architects and general contractors. [Jt. App. pp. 33a, 48a, 54a, 70a]

Builders hardware distributors call on architects and general contractors to promote the purchase and use of their products and to prepare specifications for the builders hardware required on a particular building or project. Typically, the distributor contacts only local architects and contractors and usually furnishes hardware for projects being built in his local marketing area. However, the distributor frequently will supply hardware out of his area where a local architect or contractor has the job.

4. General contractors receive bids from hardware distributors and bid for the building project. [Jt. App. pp. 44a, 48a, 53a, 59a, 63a, 72a]

The general contractor bids each building or project complete, after incorporating into his proposal for the entire job bids from his various suppliers including bids to supply the builders hardware submitted

by anywhere from three to eight builders hardware distributors. After the building contract is awarded, the winning general contractor usually negotiates with these builders hardware distributors for the hardware on the job. The builders hardware distributor who gets the order from the general contractor then places orders with the various manufacturers of the specified hardware. The distributor receives the hardware and delivers it to the general contractor who takes title and possession of the hardware and in turn installs it on the building so that it becomes an integral part of the building purchased by the owner or builder-owner---the end users claiming herein. The builders hardware is sold as a "package" for a lump sum price and the "package" always includes products of non-defendant manufacturers and may be completely comprised of the products of non-defendant manufacturers.

5. Builders hardware represents about 3/4% of the building cost. [Jt. App. pp. 35a, 46a, 50a, 55a, 72a, 77a]

The cost of the entire builders hardware package installed on a given job varies from approximately one-half of one percent to one percent of the total cost of the building and is not separately identifiable in the price which the general contractor charges the owner when he turns over the completed building. Locks of all kinds represent twenty-five percent to fifty percent of the total hardware cost and master keyed locks and cylinders constitute only a small amount of the cost of the locks and therefore only a small fraction of one percent of the total cost of the entire building.

6. Any assumed overcharge, even if identifiable, is de minimis. [Jt. App. pp. 35a, 50a, 69a, 74a]

> In a typical hardware package, only about 40% consists of products manufactured by one of the defendants (equal to .003% of the total cost of the building) and the remaining 60% consists of products manufactured by other hardware manufacturers who are not parties to this litigation. If one were to assume that the alleged conspiracy raised prices even as much as 25%, this assumed overcharge on the defendants' portion of the total builders hardware package would produce an overcharge of only .00075%---75/100,000ths of one percent of the total building costs.

The questions presented for review herein must be adjudged against the intricacies of the conspiracies alleged in this complex marketing background. Specifically, the complaints allege that the co-conspirator distributors will not sell master key systems outside of territories allocated by defendants [Jt. App. pp. 7a, 17a], that the co-conspirator distributors will not compete against the distributor who wrote the specification for a master key system [Jt. App. pp. 7a, 17a] and that the co-conspirator distributors will not compete for sales of extensions to master key systems [Jt. App. pp. 7a, 17a].

ARGUMENT

Against this complex marketing background, we come to the application of "horn book law" that---

There Are Three Indispensable Elements
To Permit Recovery Under The Clayton Act

The right of a private antitrust treble damage plaintiff to recover is conferred by § 4 of the Clayton Act which provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained * * *." (15 U.S. Code § 15)

As the statute makes clear, there are three elements necessary to recover. First, there must be a violation---"anything forbidden in the antitrust laws." Second, there must be a causal connection between the violation of law and the damages claimed ---"injured * * * by reason of." Third, plaintiff must have suffered some injury---"damages by him sustained."

This Court's most recent reaffirmation of the requirement of causation was declared by Judge Mansfield, writing for Judges Moore and Feinburg in Bowen v. New York News, Inc. (C.A. 2 1975) 1975-2 Trade Cases, ¶ 60,415, as follows:

> "With respect to The News' assignment of exclusive territories to its franchise dealers, we conclude that as a matter of law, plaintiffs lack standing because they have not asserted antitrust injury to themselves as a result of this practice. This court has held that for an antitrust plaintiff to have standing '[t]here must be a causal connection between an antitrust violation and an injury sufficient for

> the trier of fact to establish that the violation was a "material cause" of or a "substantial factor" in the occurrence of damage.'"

To the same effect are Billy Baxter, Inc. v. Coca Cola Company (C.A. 2 1970) 431 F.2d 183 cert. den'd (1971) 401 U.S. 923; Kinzler v. New York Stock Exchange (S.D.N.Y. 1974) 62 F.R.D. 196; In re Hotel Telephone Charges (C.A. 9 1974) 500 F.2d 86; and Kline v. Coldwell, Banker & Company (C.A. 9 1974) 508 F.2d 226.

While all of the elements of violation, causal connection and injury are essential to recovery, courts have repeatedly reaffirmed the need to establish causation or "impact" as a prerequisite to monetary relief. As Chief Judge Latchum pointed out in Al Barnett & Son, Inc. v. Outboard Marine Corp. (D. Del. 1974) 1974-2 Trade Cases, ¶ 75,243 at p. 97,626:

> "In a treble damage action such as this, the finding of an antitrust violation does not result in liability. * * * Thus, the determination of an essential element of the present cause of action, i.e., the fact of damage, can only be determined on an individual basis."

Judge Coxe, the court's spokesman in Locker v. American Tobacco Company (C.A. 2 1914) 218 F. 447 expressed it this way (p. 448):

> "It matters not that certain of the defendants violated the provisions of the Sherman Act un-

> less it be proved that such acts have injured the plaintiffs and caused them damages which can be recovered."

In defining the type of relationship which must be established between the plaintiffs' alleged injury and the asserted antitrust violation, courts have required that the impact be direct and not incidental. The causal connection necessary to allow recovery must be, as declared by Judge Anderson speaking for Judges Waterman and Weinfeld in Billy Baxter, Inc. v. Coca Cola Company (C.A. 2 1970) 431 F.2d 183 cert. den'd (1971) 401 U.S. 923 (p. 187):

> "sufficient for the trier of fact to establish that the violation was a 'material cause' of or 'substantial factor' in the occurrence of damage."

See also Vandervelde v. Put & Call Brokers & Dealers Association (S.D.N.Y. 1972) 344 F. Supp. 118, 145. Under this standard, losses or "overcharges" caused by factors other than a violation of the law cannot be recovered. Atlas Building Products Co. v. Diamond Block & Gravel Co. (C.A. 10 1959), 267 F.2d 950 cert. den'd (1960) 363 U.S. 843. Thus, each factor other than the antitrust violation which may have caused the alleged damage must be examined to determine whether it, rather than the violation, caused the injury.

In sum, therefore, before plaintiffs can recover damages they must establish that a particular antitrust violation was a "material cause" of or a "substantial factor" in a particular overcharge and that other factors were not responsible for the injury.

The "generalized showing of injury" adopted by the District Court will not suffice because---

Plaintiffs' Cause of Action Requires Clear Proof of Individualized Impact

In order to satisfy the impact requirement in this litigation, analysis must proceed on an individualized basis. The need for such an approach results from the plaintiffs' allegations of several interrelated horizontal and vertical conspiracies and the individual fact patterns presented by both plaintiffs and defendants.

In dealing with a conspiracy among hotel chains to add a surcharge for telephone services, the Court (Judges Ely, Trask and Wallace), in In re Hotel Telephone Charges (C.A. 9 1974) 500 F.2d 86, speaking through Judge Ely, remarked that (p. 90):

> "In this case the District Court seemed to brush aside one of the requirements of Rule 23(b)(3) by stating that at this time 'analysis of the individual v. common question issue would be for the Court to act as a seer'"

The Court discussed at length the individual questions such as the varying amount of surcharge, the different periods they were in effect, the cost of each hotel's telephone service and individual proof that each class member patronized the hotel while the surcharge was in effect and that he absorbed the cost of the surcharge. After careful consideration of all the factors, the Court reversed the lower court's order that the consolidated actions be maintained as class actions.

The issue of "generalized plaintiff injury" versus "individual questions concerning the liability of each individual broker defendant and the injury of each individual plaintiff" was squarely presented in Kline v. Coldwell, Banker & Co. (C.A. 9 1974) 508 F.2d 226. After thoughtful analysis of earlier decisions, the Court (Judge Trask, the court's spokesman; with him, District Judge Powell; concurring for separate reasons, Judge Duniway) concluded that (p. 233):

> "We cannot be persuaded that in this case proof of conspiracy or proof of illegal conduct of each defendant may be accomplished by generalized means."

With regard to trial management, the Court observed (p. 236):

> "It would appear that generalized treatment would soon fall into individualized lawsuits.

At that point the actions become unmanageable as a class action."

The judgment of the trial court that the action may be tried as a class action was reversed.

In Transit Company Tire Antitrust Litigation (W.D. No. 1975) 1975 Trade Cases, ¶ 60,144, a complex treble damage antitrust action, Judge Hunter found class action proceedings inferior to other available methods for the fair and efficient adjudication of the numerous claims because (p. 65,416):

> "these cases present questions of fact which pertain to and affect only the individual class members * * *."

The court was further convinced that (p. 65,416):

> "the presence of the individual issues of fact and the nature of those issues would, if these actions were to proceed as a class action, interpose difficulties in the management of the litigation which could not be overcome."

Thus it will be seen that---

Proof of Individualized Impact Must Be On A Transaction by Transaction Basis

The detailed nature of such proof can be seen by tracing the steps in plaintiffs' case which must be followed, assuming that a violation is established. First, in order to prove impact from

restriction on a distributor, plaintiff must show that that distributor in that instance (a) would have bid and (b) would have bid at a lower price. Second, to prove damages, plaintiff must next show, as to each job, the amount by which the restricted distributor's bid would have been lower than the winning bid. As indicated above, each job is analyzed and bid separately and hence the transactional basis of the inquiry is clear.

It was exactly this type of analysis of "fact questions of a highly individualistic nature" in the marketing of marine accessory products which compelled the court in Al Barnett & Son, Inc. v. Outboard Marine Corp. (D. Del. 1974) 1974-2 Trade Cases, ¶ 75,243, to deny class treatment. Chief Judge Latchum reasoned as follows (pp. 97,629-30):

> "For example, in order for the named plaintiffs and the members they purport to represent to prove the fact of damages as to each of the marine products in suit, they must individually demonstrate among other things (a) that they distributed the competitive product, (b) that the product was designed to be used with OMC's outboards, (c) that they sold these particular products to OMC dealers, (d) that if OMC's marketing practices had been proper, they would have been able to sell more of such products to OMC retail dealers, and (e) that their additional sales would have constituted a substantial amount of commerce."

In addition, the court listed the following fact questions which would have to be established "by each class member" (p. 97,630):

1. The [illegible]ting area in which the class member does business;

2. Competition within the area;

3. The class member's pricing policies;

4. Its business reputation in the community;

5. The price and quality of the product it sells in competition with OMC's products;

6. The subjective preferences of the particular OMC retail dealer served by a particular distributor-class member.

Since each of these "fact questions of a highly individualistic nature" is present in the case at bar, it is clear that---

Generalized Damage Approach Approved By The District Court is Improper

The need for transaction by transaction analysis of the impact question becomes even more obvious when the various purchasing alternatives available to a plaintiff-owner are recognized. Master key extensions provide an excellent example of the various alternatives.[6]

A master key extension involves the supplying of additional locks which are keyed so that both the original locks and the new locks can be opened by the same master key. Whenever an individual or institution wishes to add to an existing building

6. There are, however, several others, including quality of hardware, product mix, e.g. whether all of one manufacture, and restrictive keying arrangements.

or construct a new building in an existing complex, it is, as Judge Decker declared in Mid-America Builders Supply, Inc. v. Sargent & Company (N.D. Ill. 1974) Docket No. 73 C 1083, attached in the Addendum hereto, "the owner who decides whether or not a master key system already established in a building will be continued * * *." (See also Jt. App. p. 171a as to the practices of plaintiff-Amherst Leasing.)

The owner of the building has a number of alternatives available in making his decision, each of which significantly affects the competition for the locks. If the owner decides to continue a particular master key system in the same brand, competition in the supply of locks is limited to authorized dealers who have access to the brand of system to be continued. If, on the other hand, the owner decides not to continue a master key system, the brands which can be supplied are limited only by the quality standards of the specifications.

Plaintiffs' case relies heavily upon two distinct allegations pertaining to situations involving master key extensions, i.e., additions to existing systems. First, plaintiffs allege that defendants conspired with each other to prohibit their distributors from bidding on the master key systems of other manufacturers. Second, plaintiffs allege that the manufacturers of master key systems agreed with their distributors to allocate such

systems among them. Assuming arguendo that plaintiffs succeed in proving either one or both of these allegations, they must also establish that the violation proved is a "material cause" of any injury suffered by them. With regard to the alleged horizontal agreement among defendants, since the plaintiff-owner is responsible for the decision to continue a master key system, the jury must decide whether it was the defendants' supposed conspiracy or whether it was the limitation imposed by each plaintiff-owner which was responsible for the alleged overcharge.

Likewise, with regard to the alleged vertical agreements to allocate key systems among distributors, to the extent that the contractor or owner selected a particular distributor for reasons other than the price bid by that distributor, serious questions arise as to whether the contractor or owner's choice, as opposed to the alleged violation, gave rise to the supposedly inflated price. For example, the named plaintiffs in Amfac Leasing continued to buy their hardware from a single distributor, Atlantic Hardware, even when the same hardware may have been offered at a lower price by another distributor in the same city. [Jt. App. pp. 172a-174a]

Hence, where individualized damages must be shown to satisfy the requirement of impact---

The District Court's "Footnote 3" Simply Misconceives Plaintiffs' Burden In A Claim For Antitrust Damages

In the memorandum entitled "Ruling on Pending Motions," 1975 Trade Cases, ¶ 60,377, Judge Blumenfeld in footnote 3 (p. 66,638) characterized as "a red herring" defendants' argument that there must be (1) violation of law, (2) causal connection, and (3) injury or fact of damage in order for recovery to be allowed. [Jt. App. pp. 152a-163a]

Under the District Court's analysis, it is anticipated that there be proof, or a stipulation, that plaintiffs "bought master key systems" (p. 66,638). However, the unquestioned fact in these cases is that no single plaintiff in the governmental class and no building owner in the private class ever bought builders hardware or master key systems from any defendant or any defendant's distributor. Rather, the acknowledged fact is that general contractors bought builders hardware (including master keyed locks) from defendants' distributors and installed the hardware on buildings later sold or transferred to plaintiff-governmental entities.[7]

---Plaintiffs' status as remote claimants must be recognized.

7. The District Court stated the fact more nearly correctly in ruling on defendants' Motion for Summary Judgment (1973-2 Trade Cases, p. 94,977): "The governmental plaintiffs did not purchase the hardware directly from the defendants or their distributors."

The difference between the status of a direct purchaser (as assumed by the District Court) and the status of remote claimant (precluded from recovery as held in Mangano v. American Radiator and Standard Sanitary Corp. (C.A. 3 1971) 438 F.2d 1187) is a vital distinction which must be kept clearly in mind in considering the class certification and manageability aspects of these cases.

The District Court then takes the proof one step further in the "red herring" footnote. The second step assumes that plaintiffs will show that defendants engaged in a conspiracy to stabilize prices of master key systems at uncompetitive levels. Even this second step is wholly insufficient because, at this point, plaintiffs have done no more than show violation of the law. They have not proved liability for antitrust damage.

The "bridge" or causal connection from such violation of law to actual injury to a plaintiff cannot be assumed---as does Judge Blumenfeld---but must be proved by each such plaintiff in order for such plaintiff to establish a cause of action under § 4.

Again, the essential elements are:

(1) a person injured in his business or property;

(2) by reason of anything forbidden in the antitrust laws; and

(3) damages by him sustained.

---Established authority requires individual proof of causation.

Other courts have clearly understood and applied each of these three essential elements. In considering plaintiffs' motion to maintain class action in San Antonio Telephone Company v. American Telephone and Telegraph Company (W.D. Texas 1975) 1975-2 Trade Cases, ¶ 60,421, Judge Wood observed that (p. 66,853):

> "whether a monopoly causes damage to an individual in his business such that he may bring an action therefor and recover monetary * * * relief * * *, is a factual determination to be made on each individual case. Once again, the fact of damage must be proved as to each individual member of the class."

In declaring the proposed class unmanageable, Judge Wood noted (p. 66,853):

> "Thus, it appeals (appears) that even the plaintiffs recognize that proof of the fact of damage is necessary for the success of their complaint. Such proof would have to be on an individual basis as to each member of the class."

After noting the exact requirements of § 4, the Court concluded (p. 66,854):

> "In other words, a prospective plaintiff must show first of all that there was an anti-trust violation and, if so, he must show that such violation complained of has directly injured him."

In the context of an alleged tie-in arrangement, tying purchases of feed to extensions of credit, Judge Elliott in Plekowski v. Ralston Purina Company (M.D. Ga. 1975) 1975-2 Trade Cases, ¶ 60,411 reviewed the provisions of § 4 and emphasized that a treble damage claimant can recover (p. 66,801):

> "only where he has suffered an injury that was proximately caused by the alleged antitrust violation. This requirement, which has been referred to variously as 'causation', 'proximate cause', 'burdensomeness', 'impact', 'injury' and 'fact of damage', is an essential element of a treble damage claimant's liability showing in an antitrust case."

Where the need for proof of particularized impact to show liability is established, it becomes obvious that---

Liability and Damage Issues May Not Be Separated Where Such Issues Are Inextricably Interwoven

Important considerations for separation of issues under Rule 42(b)[8] are conservation of judicial time and resources and speeding the ultimate disposition of the case. Although Rule 42 (b) expressly recognizes the legitimacy of these considerations

8. Rule 42(b) provides in part: "(b) Separate Trials. The Court, in furtherance of convenience * * * or when separate trials will be conducive to expedition and economy, may order a separate trial * * * of any separate issue * * *."

of convenience, expedition and economy, the trial as currently proposed herein will not expedite these proceedings. In light of the interrelationships between the issues of violation and impact and the increased time necessary to try separately the issues of impact and measure the amount of damages, the considerations urged by plaintiffs are neither realized nor sufficient to justify separate trials of any of the issues of violation, impact or damage.

The principle that issues which are inextricably interwoven cannot be separated for purposes of trial was best stated in Swofford v. B&W, Inc. (C.A. 5 1964) 336 F.2d 406. Judge Rives, writing for the Court (Chief Judge Tuttle and Judge Wisdom), declared (p. 415):

> "There is an important limitation on ordering a separate trial of the issues under Rule 42 (b): The issue to be tried must be so distinct and separable from the others that a trial of it alone may be had without injustice."

The issues of violation and impact in antitrust cases generally, and in this case in particular, are prime examples of the types of issues which are not "distinct and separable." As noted in the earlier analysis, each of these issues is equally essential to establish the liability of defendants. They are, therefore, both part of the same step in plaintiffs' attempt to gain recovery from defendants.

In this litigation, it strains credulity to understand how the cases could proceed on a separated basis. Assume that plaintiffs could succeed in establishing certain abstract violations. Plaintiffs would not have established any right to recovery. Rather, they would then have to show that defendants' violation resulted in their being damaged. The difficulties of this analysis and the need to focus on the details of each transaction have been discussed earlier. Plaintiffs' proof of the manner in which they were affected by a given violation would also require analysis of the precise details of the acts of defendants which purportedly constituted the violation. In the process, much of the evidence used in the earlier trial to establish defendants' violation would have to be analyzed again in light of specific factual situations. This would result not in an expedition of these proceedings, but in their delay. Nevertheless, such delay would be unavoidable, since to shortcut the analysis by relaxing the standard of proof necessary to establish the causative link would lead to the very kind of injustice against which the court warned in Swofford.

The current and better view on the precise problem of separation was stated by Chief Judge Latchum in Al Barnett & Son, Inc. v. Outboard Marine Corp. (D. Del. 1974) 1974-2 Trade Cases, ¶ 75,243 as follows (p. 97,632):

> "Admittedly, whether separate trials to separate juries is constitutionally permissible has not been authoritatively decided, but courts have cautioned that where the issue of fact of damages and a violation of antitrust laws are so intertwined and essential to a finding of liability it may not be constitutionally possible to separate these issues of liability before different juries without the defendant's consent."

The issues of violation and impact cannot, therefore, be separated. They are both part of the question of liability and that question must be answered in one trial in which the impact of any purported violations is established on a transactional basis. Indeed, the District Court acknowledged that if he erred---as defendants' urge he did---in his "generalized showing of injury" approach, then it must be conceded that (Jt. App. p. 166a):

> "the utility of separate trials of liability and damage issues would be nil."

Furthermore---

The Peculiarities of Marketing of Contract Hardware Do Not Permit Trial by Methods Appropriate to Other Cases

It will be recalled that contract hardware is sold by the manufacturer to an authorized dealer, frequently at a discount below the net price where competitive conditions dictate. The authorized contract hardware dealer in turn puts a "mark-up" on the product which is influenced by some or all of the following factors:

1. size of the order; [Jt. App. p. 54a]

2. geographic location of the job; [Jt. App. pp. 54a-55a]

3. prior relationships with the particular contractors being bid; [Jt. App. pp. 65a, 66a]

4. backlog of his contract hardware business; [Jt. App. p. 65a]

5. competition expected from other dealers bidding the same job. [Jt. App. pp. 64a, 69a]

The general contractor who purchases the hardware installs it in the building and includes the cost as part of his total comprehensive charge to the owner. Such cost is marked up by the general contractor according to a wide variety of factors such as:

1. current state of the construction industry; [Jt. App. pp. 59a, 76a]

2. the contractor's backlog; [Jt. App. pp. 59a, 76a]

3. the contractor's experience with the type of construction; [Jt. App. p. 59a]

4. the contractor's usual profit and overhead as applied to the particular job. [Jt. App. 74a]

Assuming an overcharge of some proportion, at some point in this transactional chain arises the question whether any portion of such overcharge eventually is "passed on" to the owner who here

may be a member of one of plaintiffs' classes. The considerations affecting the resolution of the pass on issue clearly reflect the need for transaction inquiry.

The pass on issue arises because of the remote claimant status of the public entity plaintiffs. Even some of the private plaintiffs (styled "builder-owners"), although not as far removed from the manufacturers as the public bodies, must establish that the alleged overcharges were borne by them in order to recover. As the District Court expressly recognized in ruling on defendants' Motion for Summary Judgment (1973-2 Trade Cases, ¶ 74,680, p. 94,982):

> "An important issue of fact--whether a 'cost plus' or analogous fixed mark-up arrangement exists between contractors and buyers with respect to builders' hardware is a matter of great dispute." [Jt. App. p. 97a]

Similarly, Judge Decker in Boshes v. General Motors Corp. (N.D. Ill. 1973) 1973-1 Trade Cases, ¶ 74,433, took great care in making clear that even if antitrust violations resulting in increased prices were established (p. 94,150):

> "Plaintiffs would still have to prove that retail dealers passed on the 'overcharge' to them."

The question of whether a "cost plus" or analogous fixed mark up arrangement exists must be separately determined for each

transaction. Each of the separate factors in the chain of distribution and the interaction between those different factors affect the determination of whether any alleged overcharge was passed along from the manufacturer through the dealer to the contractors to the owner. Proper evaluation of these factors and their interaction requires that analysis proceeds on a transaction by transaction basis.

The Realities of The Market Place Must Be Recognized In Fashioning A Trial Format

The procurement practices of governmental entities with regard to master key systems are subject to considerable variation. In presenting to the District Court, defendants' arguments not on the merits but rather in support of defendants' position that the issues of liability and damages cannot be separated, defendants' illustrated this variety of state purchasing practices.

In Tennessee, for example, a policy was in effect during the period complained of in these actions which precluded the hardware specification (which prescribes the materials to be supplied) from requiring extensions to existing master key systems.

Mississippi, on the other hand, permitted extensions of master key systems but the state universities all contained master key systems in the Corbin, Yale & Russwin brands and extensions

could be furnished in any one of those brands.

New York, in a novel approach, sought to provide for extensions to its master key systems by arranging to have the various lock manufacturers reach an agreement to interchange cylinders, thereby allowing any manufacturer to extend the master key system of any other manufacturer.

In yet another approach, California required specifically that on certain projects master key systems had to be extended and no substitutes were to be allowed. On some new projects, the University of California required that the projects be keyed to any one of three existing master key systems.

---Individual issues are compounded by diverse purchasing policies.

Each of these variations poses unique questions as to the existence of any restrictive practices under such conditions and the impact of any such practices which may have existed. Thus, the number of individual issues is further compounded. In addition, independent of the owners' conduct, regional and local variations in market conditions and distribution patterns significantly affect the impact of any supposed violations. A restriction as to the master key systems on which a distributor may bid is of much more consequence in New York City than in Boise, Idaho where the limited demand and the greater distances involved serve

to restrict the number of distributors an area can support, and, consequently, the number of bids submitted on a given project. The resolution of both horizontal and vertical issues, therefore, requires a detailed examination of the particular circumstances surrounding each transaction.[9]

There is simply no national market in this litigation. Rather, there are several markets in which different manufacturers compete.

There are no typical distributors here. Rather there are hundreds of different distributors working with hundreds of different architects and contractors under a variety of conditions throughout the country.

There is no uniform type of purchase. Rather there are original installations and there are extensions, ranging in cost from thousands of dollars to just a few dollars.

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9. Transaction analysis serves not only to provide better insight into the alleged impact of a putative violation by defendants but may also serve to disprove the very existence of such violations. Each transaction is both a product of and an influence on its market environment. To the extent that plaintiff-owners decide to extend master key systems, they are not only foreclosing any possible impact on them of any alleged conspiracy to prohibit bids on other manufacturers' systems, they are also creating a market environment in which it no longer benefits a distributor to bid on another manufacturer's system. By so doing an alternative explanation of the conduct which plaintiffs allege to be representative of anticompetitive activities becomes apparent. The transaction analysis necessary to prove impact, therefore, serves the additional purpose of providing for a better understanding of the market conditions and effect of such conditions on the acts of defendants.

There is no typical purchaser whose methods are reflective of all others. Rather there are thousands of different purchasers with different needs, desires and procurement practices.

The issues described above cannot be segregated from whatever common issues might exist by separating the liability and damage aspects of this case. Proof of a violation in one situation cannot be used to impute to defendants similar violations in other situations. Evidence of conduct in one region cannot be viewed as descriptive of the conditions and patterns in another area. Similarly, assuming that such abstract violations could be shown, plaintiffs would still be required to show that such violations were the material cause of their injury.

Similar factors were considered by Judge Elliott in Plekowski v. Ralston Purina Company (M.D. Ga. 1975) 1975-2 Trade Cases, ¶ 60,411 and led the Court to conclude that (p. 66,802):

> "It is clear that proof of causation is an individual, rather than a common, question of fact and law."[10]

10. In his analysis of the issue of individualized impact in a tie-in arrangement, Judge Elliott has occasion to note that Ungar v. Dunkin Donuts of America, Inc. (E.D. Pa. 1975) 1975-1 Trade Cases, ¶ 60,204, cited by Judge Blumenfeld in three places in his "Ruling on Pending Motions", 1975 Trade Cases, pp. 66,637 and 66,638: "held that individual coercion is not properly part of tie-in law, and stands against the clear weight of authority." (1975-2 Trade Cases, p. 66,802, footnote 2)

Neither may the need for transactional inquiry be curtailed by limiting it to questions of pass on or master key extensions. These two issues are representative of, rather than distinct from, the other issues raised by plaintiffs' claims. For example, plaintiffs' allegation that defendants conspired both horizontally and vertically to restrict competition on original installations by agreeing to have their distributors honor the specifications prepared by another distributor raises a host of considerations, which also require analysis of the details and circumstances of each transaction.

It will not do to attempt to generalize all marketing realities. Nor can they be ignored. They must be recognized and dealt with in order that a trial format manageable by the Court and comprehensible by a jury may be determined.

The analysis so far has emphasized the differences in distribution and marketing by manufacturers and distributors and the equally prevalent differences in the purchasing practices of contractors and in the specification preferences of plaintiffs. These widely disparate factual differences are offered not for the merits of plaintiffs' claims, but simply to illustrate the impossibility of separating the issues in the manner ordered by the District Court.

But it is not only factual differences which abound in this litigation. There are legal issues such as fraudulent concealment---alleged in most but not all of the complaints---and the statute of limitations. These issues differ from state to state and from time period to time period. For example, defendants have filed a motion for summary judgment against California because the state attorney general in 1963 sought injunctive relief against the very practices for which he is now claiming damages. As Judge Hunter ruled in Transit Company Tire Antitrust Litigation (W.D. Mo. 1975) 1975 Trade Cases, ¶ 60,144 at p. 65,416:

> "And, if there is present a likelihood that significant questions not only of damages but of liability and defenses to liability will arise affecting only individual members of the class in different ways, class action treatment is inappropriate."

With all the foregoing variations in fact patterns and legal issues, the trial of 14 state-wide class actions together with a national class of public entities and another national class of owners and builder owners is unrealistic at best and mind-boggling at worst.

Antitrust Liability for § 4 Purposes Cannot Be Shown Simply By Documents Suggesting Attempted Restraints

Plaintiffs' Designation of Evidence [Jt. App. pp. 395a-523a] was allowed to be filed by the District Court, over defen-

dants' objections, in lieu of sworn answers to comprehensive interrogatories propounded to plaintiffs by defendants. Defendants' motions to compel answers under Rule 37 were denied and all such discovery has been denied defendants to date.

Defendants' unanswered interrogatories sought to develop detailed analysis of (a) the alleged conspiracies; (b) impact of such conspiracies on particular building construction projects; and (c) the exact amounts of overcharges claimed by plaintiffs as they related to specific jobs and projects. Instead, defendants have been furnished with a narrative larded with inuendo and inferences of wrongdoing and restraint but stopping woefully short of showing any causal connection between the demonstrated actions and any measureable damage.

The District Court's acceptance of plaintiffs' "Designation of Evidence" instead of requiring full and complete answers to interrogatories---contrary to the Federal Rules---points up the immense difficulties to be anticipated if this case proceeds to trial in its current posture. Plaintiffs have represented to the District Court that their "Designation of Evidence" contains "80% to 90% of their case". Even so, defendants should be entitled to their discovery so as to have sworn admissions that plaintiffs have no other evidence of alleged wrongdoing and have no evidence whatsoever that the instances relied on directly caused

any increased prices for builders hardware which were actually charged to the general contractors and which were demonstrably passed on to and paid by individual members of plaintiff class on specific building construction projects.

It should be remembered that:

1. Plaintiffs must show that the restrictions were implemented uniformly as to all class members, or if not, then each plaintiff must show the manner in which they were implemented as to it.

2. Plaintiffs must show the fact and amount of higher prices charged building contractors by hardware distributors resulting directly and solely from defendants' illegal acts; and

3. Plaintiffs must demonstrate that the higher charges were neither reduced nor absorbed by the general contractors who sold buildings to plaintiffs.

Plaintiffs' argumentative assortment of references to documents and deposition testimony satisfies none of the requirements of the decisions that plaintiffs, in order to establish their right to recover antitrust treble damages, must show violation, causal connection and individualized impact by way of injury.

Since the District Court misconceived these essential elements---

The Order of Consolidation Constitutes Prejudicial Error

The leading cases on consolidation are Garber v. Randall (C.A. 2 1973) 477 F.2d 711 and MacAlister v. Guterma (C.A. 2 1958) 263 F.2d 65. These and other leading authorities are discussed in "Brief of Defendants-Appellants in Opposition to Motion to Dismiss Appeal" at pp. 30-45 and that discussion will not be repeated here.

It is clear that the action of the court below transferring and consolidating all cases is improper, dependent as that action is upon the District Court's mistaken ruling that trial of all cases so transferred and consolidated can proceed on a generalized showing of injury. Because the foundation for the ruling is wrong, the order must be reversed.

So too---

Defendants Are Entitled To Have The Same Jury Resolve Both The Liability And Damage Issues

Since the present litigation consists of several actions at law for damages, defendants are entitled, under the Seventh Amendment to the Constitution, to trial by jury of all issues of fact. Beacon Theatres, Inc. v. Westover (1959) 359 U.S. 500; Bertha Building Corp. v. National Theatres Corp. (C.A. 2 1957) 248 F.2d 833 cert. den'd (1958) 356 U.S. 936; Dairy Queen, Inc. v. Wood (1962) 369 U.S. 469. Under the circumstances of this liti-

gation, in which the issues of violation, impact and damages are inextricably interwoven, all issues of fact must be tried by the same jury.

Rule 42(b) expressly recognizes the importance of protecting a party's right to trial by jury by requiring that any separation of issues must preserve "inviolate the right to trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States." Fed. R. Civ. P. 42(b). This concern has led the authors of the Manual for Complex Litigation to note that:

> "Whenever feasible the same jury which tries the issue of liability should try the issue of damages." § 4.12

In fact, cases e.g. Bvocik v. Firestone Tire & Rubber Co. (E.D. Wis. 1967), 277 F. Supp. 210, relied upon by plaintiffs reveal that the granting of separate trials is often based upon the premise that the same jury will determine both liability and damages. Id. at 211.

In this regard, it has long been recognized that in order for an issue to be tried to a separate jury it must be "so distinct and separable from the others that a trial of it alone may be had without injustice." Gasoline Products Company, Inc. v. Champlin Refining Co. (1931) 283 U.S. 494, 500 (emphasis supplied).

The need to have the same jury determine both liability and damages was recognized in the context of a Rule 42(b) motion in United Air Lines, Inc. v. Wiener (C.A. 9 1961) 286 F.2d 302 cert. den'd (1961) 366 U.S. 924. In Wiener, the Ninth Circuit reversed the District Court's order bifurcating the issues of liability and damages, noting (p. 306):

> "We do not say that in no circumstances can a separate jury determine the issue of damages after another jury has determined the issue of liability, * * *. We do hold that under the circumstances presented by this appeal the issues of liability and damages, exemplary or normal, are not so distinct and separable that a separate trial of damages may be had without injustice. The question of damages is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty which would amount to a denial of a fair trial."

In the present litigation, as in the Gasoline Products and Wiener cases, the issues of violation, impact and damages are inextricably interwoven. To attempt to submit such issues to separate juries, therefore, would result in the same "confusion and uncertainty" which the court in Wiener held sufficient to reverse the District Court's order separating the issues of liability and damages. In order to avoid such confusion and to ensure defendants a fair trial, the Court should reject any attempt to deprive defendants of their right to have both liability and damage issues fully determined by the same jury.

Unless the District Court's orders are overturned---

Defendants Will Be Forced Through A "liability" Trial When It Is Highly Unlikely Damages Can Be Demonstrated

The District Court, in ruling on defendants' request for certification, acknowledged that "there is substantial ground for difference of opinion" [Jt. App. p. 166a] on the question whether particularized "impact" must be shown as an element of establishing liability. Further, the District Court characterized the question as "'controlling' within the meaning of § 1292(b)" [Jt. App. p. 166a]. Plainly, the generalized damage approach of the District Court does not satisfy the express requirement of § 4 and cannot be allowed to be imposed on defendants.

But more important is the consequence of making defendants stand trial on an issue of "violation" contrived simply for purposes of manageability, where hundreds, if not thousands of plaintiffs' "class" members can show no impact or injury for all of the reasons discussed above.

And even more to the point is the District Court's acknowledgment that but for the proposed separation of the "liability" issue trial of these cases may very well be wholly unmanageable. As the District Court put it [Jt. App. p. 165a]:

> "If the defendants are correct, the validity of two conclusions necessary for the class certifications entered--that common issues predominate over individual issues and that trial of the case as a class action would be manageable--would be open to serious question."

In fact, what plaintiffs must admit here is that application of the proper elements of § 4 can result only in a legal morass from which neither judge nor jury could ever be extricated. Counsel for plaintiffs, having ignored the warning sounded by Judge Medina, writing for Judge Lumbard with Judge Hays concurring in the result, in Eisen v. Carlisle & Jacquelin (C.A. 2 1973) 1973 Trade Cases, ¶ 74,476, must take some of the responsibility for leading the District Court into this morass (p. 94,113):

> "by adopting the erroneous and frustrating view that some way must be found to make the case viable as a class action." (Emphasis by the Court)

Coming then to the relief here requested.

Defendants urge that this Court declare that the District Court erred in certifying classes, in ruling that all "non-Connecticut" cases could be transferred to the District of Connecticut, in ruling that all such cases could be consolidated and in ruling that the cases could be tried on the issue of "liability" alone.

The litigation should be returned to the District Court to determine whether any of these cases can be tried on all issues as a proper class action under Rule 23.

Respectfully submitted,

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CERTIFICATION

I, WALTER A. BATES, do hereby certify that I have on this 15th day of September, 1975 mailed, postage prepaid, a copy of the foregoing Brief of Defendants-Appellants to counsel on the attached service list of counsel.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MID-AMERICA BUILDERS SUPPLY, INC.,	)	
Plaintiff,	)	
-vs-	)	NO. 73 C 1088
SARGENT & COMPANY, etc., et al.,	)	
Defendants.	)	

MEMORANDUM OPINION

Plaintiff, Mid-America Builders Supply, Inc. ("Mid-America") has brought a complaint against Sargent and Company ("Sargent"), Walter Kidde & Company, Inc., and Ken Lee Hardware Company ("Ken Lee"), for violations of the Sherman Act. 15 U.S.C. §1 et seq. In the complaint, plaintiff alleges that "defendants have engaged in an unlawful combination and conspiracy to eliminate competition in the sale of finish hardware in public and private construction projects in the trade area" in violation of Section 1 of the Sherman Act. Plaintiff further charges that "defendants have monopolized and attempted to monopolize and have combined and conspired with each other to monopolize" the relevant market in violation of Section 2 of the Sherman Act. The "trade area" involved consists of the counties of Cook, Lake, McHenry, Winnebago, DuPage, Kane, Kankakee and Will, in the State of Illinois. Plaintiff seeks treble damages and various forms of injunctive relief pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §15 and §26. This memorandum opinion will con-

stitute the court's findings of fact and conclusions of law for this case pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

I. The Parties

A. Mid-America

Plaintiff Mid-America Builders Supply was founded in 1964 by David Oaks, a former salesman for Sargent and Company, as a distributor of builders hardware in the metropolitan Chicago area. In 1967, Oaks caused the business to be incorporated as Mid-America Builders Supply, Inc., and Oaks has continuously been the sole shareholder of the corporation since that date. Throughout the periods relevant to this action, Mid-America maintained a small office and warehouse in Chicago, and except for a brief period in 1972, employed only Oaks and a secretary.

B. Sargent and Walter Kidde & Company, Inc.

Defendant Sargent and Company is a Delaware corporation having its principal place of business in New Haven, Connecticut. Since 1967 Sargent has been a subsidiary of defendant Walter Kidde & Company, Inc. Sargent manufactures a line of "finish" hardware which includes locks and keys, latches, door closers, exit devices and miscellaneous hardware used for doors and openings. It sells this builders hardware to independent distributors (like Mid-America) for resale to building contractors for installation in building construction projects.

C. Ken Lee

Defendant Ken Lee Hardware Company is an Illinois corporation having its principal place of business in Chicago. In 1965

a predecessor corporation (of the same name) sold its assets to the present corporation. Mr. Kenneth Lee was the principal stockholder in the predecessor, but has no ownership interest or control in the successor corporation. Ken Lee is also a distributor of builders hardware in the metropolitan Chicago area. At all relevant times for purposes of this litigation, Ken Lee operated a much larger business than Mid-America, occupying a large office and warehouse, stocking substantial quantities of goods of Sargent and other manufacturers, and employing locksmiths and other specialists in the business of selling builders hardware. It maintained a service department and sold builders hardware over the counter to customers which included Mid-America.

II. Description of the Business of a Distributor of Business Hardware

The plaintiff and defendant Ken Lee are both in the business of distributing builders hardware in the metropolitan Chicago area. Such a distributor would contract with architects or building contractors, either by negotiation or competitive bidding, to supply them with finish hardware to be used in their construction projects. Ken Lee and Mid-America could supply products from several manufacturers including Sargent, and would negotiate or bid to contract to supply a given manufacturer's product at a certain price. Neither Ken Lee nor Mid-America maintained sufficient inventory of every product to supply finish hardware for particular construction projects; as a result, each would have to order the required hardware from the manufacturer. When purchasing from Sargent, the distributor would order from

Sargent's home office in New Haven, Connecticut, and the goods would be shipped from there into interstate commerce.

From 1965 through 1972 gross sales by Mid-America of all builders hardware and hollow metal doors and frames were as follows (using a fiscal year of July 1 to June 30 for periods after its incorporation):

1965	1966	1967	1968-69	1969-70	1970-71	1971-72
$ 87,752	$136,752	$187,273	$139,539	$ 85,078	$176,614	$243,647

Mid-America had purchases of Sargent builders hardware items for the period 1965 through 1972 as follows:

1965	1966	1967	1968-69	1969-70	1970-71	1971-72
$ 39,547	$ 67,901	$ 68,831	$ 23,035	$ 11,633	$ 8,479	$ 3,344

Ken Lee had purchases of Sargent builders hardware items for the same period as follows:

1965	1966	1967	1968	1969	1970	1971
$485,971	? (No evidence offered.)	?	$579,081	$591,581	$720,525	$694,680

III. The Plaintiff's Claims

A. Restrictions on Ken Lee Jobs

Mid-America claims that Sargent and Ken Lee restricted it to only those construction jobs within the metropolitan Chicago area that were not being bid on by Ken Lee or were not being erected by architects or general contractors with whom Ken Lee did business. The sole basis in the record for such a claim is the

testimony of David Oaks that in January, 1964, while he was employed as a sales representative for Sargent, and prior to the existence of the defendant Ken Lee, he met with Mr. Kenneth Lee and William J. Healy, a Sargent sales representative in the Chicago area. At that meeting, Oaks testified he was told not to call upon architects and general contractors currently serviced by Ken Lee's predecessor. He later received a list of such customers. But there was no evidence offered that Mid-America sought to solicit business from the architects or general contractors on the list or was restrained in any way by either Sargent or Ken Lee from soliciting their business or ever complained to Sargent or Ken Lee of any such restraints. In fact, the only instance as to which there is evidence where Mid-America sought to bid on the same job on which Ken Lee submitted a bid was the Bel Harbour apartments project in 1966, and in that case, the builders hardware contract was awarded to Mid-America. That job, however, required Mid-America to supply Sargent Maximum Security lock cylinders, which Mid-America was not authorized to distribute. Thus Mid-America had to purchase the cylinders from Ken Lee, but did so at factory cost.

B. Restrictions on Extensions of Master Key Systems

Plaintiff claims that Sargent restricted distributors from bidding on extensions to established master key systems so as to favor the Sargent distributor who originally established the system. A master key system is a lock and key system designed specifically for a particular building or a complex of buildings

in accordance with a plan for limiting access to specified areas within such building or buildings. Such a system provides a key for each door, each of which is keyed differently: one or a series of master keys which will lock and unlock a certain group of doors; one or a series of grand master keys which will lock and unlock two or more groups of doors, and a great grand master key which will lock and unlock all doors in the system. Locksets for use in master key systems were offered for sale and sold by Sargent to both Mid-America and Ken Lee for resale to building contractors in the Chicago area. An addition to or extension of a master key system is installed when there is constructed either an addition to a building or an additional building in a complex, and the keying of the locks in such addition or building are made accessible by a master key used in the original system. It is the owner who decides whether or not a master key system already established in a building will be continued in an addition to the building or in another building in the complex. Once that decision is made, it is generally the architect or general contractor who procures the hardware, either by soliciting bids or by negotiating its purchase.

Mid-America offered no evidence that it had ever bid or sought to bid on the extension of any master key system, nor did it offer evidence that Sargent had refused to sell locks to Mid-America for installation in the extension of any master key system. There was evidence that Mr. Healy sought to assist Ken Lee in obtaining sales of Sargent builders hardware by requesting Sargent to refuse to sell items of builders hardware to distribu-

tors selling only other brands of builders hardware. Concerning the jobs on which plaintiff claims Sargent refused to sell hardware for extensions of master key systems to any hardware dealer but Ken Lee, such similar occurrences led to a consent decree issued by the United States District Court for the District of Connecticut on April 8, 1970, in a civil action, No. 13,263, filed against Sargent by the United States. As to the jobs cited by plaintiff, Mid-America was in no way involved; in no case was there evidence that Mid-America had bid or sought to bid on any of the jobs in question. Thus any antitrust violation committed by Sargent or Ken Lee in this regard did not cause any direct injury to Mid-America. The courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.[1] There must be a direct injury to the plaintiff whose business was in the "target area" of the defendant's illegal act. Billy Baxter, Inc. v. Coca-Cola Company, 431 F.2d 183, 187 (2d Cir. 1970), cert. denied 401 U.S. 923 (1971).[2]

C. Restrictions on Dealing outside the Assigned Territory

Plaintiff claims that Sargent assigned its distributors to exclusive geographical territories. Mid-America and Ken Lee

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1 Hawaii v. Standard Oil Co., 405 U.S. 251, 263, n.14 (1972). See Standing to Sue for Treble Damages under §4 of the Clayton Act, 64 Colum.L.Rev. 570 (1964).

2 See also Reibert v. Atlantic Richfield Company, 471 F.2d 727 (10th Cir. 1973).

were "assigned" to the metropolitan Chicago area. Mid-America claims that Sargent attempted to confine it to that area and prevent it from contracting to supply Sargent products in other areas. There was no evidence of any situation where Mid-America sought to supply builders hardware to an architect or general contractor outside the Chicago area but was denied the products by Sargent. In one instance, Mid-America did supply Sargent products outside the "assigned" territory.[3] It complains only that Sargent supplied the goods at the usual fifty percent dealer discount without offering an additional discount. There were two occasions, however, where Sargent refused to fill Mid-America's purchase orders.[4] In neither instance, did Mid-America contract to supply builders hardware to architects or general contractors. In each case, a local hardware dealer had obtained the primary contract.[5] Since neither was an authorized Sargent distributor, each sought to purchase Sargent goods through Mid-America.

Defendants argue that Mid-America was acting merely as an agent for those dealers since it was in the business of contract supply to architects and general contractors, rather than that of being a jobber for hardware dealers. Defendants' theory, therefore, is that Sargent did not refuse to sell to Mid-America; rather

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3 The Western Illinois University job in Macomb, Illinois, in 1966.

4 The Temple Building job at the University of Nebraska in Lincoln, Nebraska, in 1965; and the Lutheran Home for the Aged job in Mason City, Iowa, in 1968.

5 The Schollman Hardware Company in Nebraska, and the Curries Manufacturing Company in Iowa.

it refused to sell to the unauthorized distributors who were attempting to purchase through Mid-America. Plaintiff argues, however, that under the rule of United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), the manufacturer's limitation on the distributor's freedom to resell products constitutes a per se violation of the Sherman Act. Thus plaintiff's claim is not that Sargent restricted its bidding or contracting outside the territory, but that it restricted its resale to non-Sargent distributors outside the territory. Resale to unauthorized distributors, however, was not the type of transaction that the Supreme Court sought to protect in Schwinn. As the district court noted in that case, if franchised dealers who "acted as a funnel" for unfranchised dealers had, as a result of such activities, lost their franchises, "it would [have been] a lawful cancellation." United States v. Arnold, Schwinn & Co., 237 F.Supp. 323, 335 (N.D.Ill. 1965).

Moreover, even if such conduct on Sargent's part constituted a violation of the Sherman Act, the plaintiff is barred from recovering the treble damages it seeks under Section 4 of the Clayton Act by the Statute of Limitations of Section 4B of the Act, which provides a four-year period within which a cause of action under Section 4 must be brought. 15 U.S.C. §15b.[6] The complaint was filed April 26, 1973; thus plaintiff can recover damages only for actions arising after April 26, 1969. All the

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6 During the course of the trial, the court ruled that the tolling provisions of 15 U.S.C. §16 are inapplicable to the facts of this case.

instances cited by plaintiff under this cause of action occurred prior to 1969.

IV. Injury and Damages

In a private antitrust action, a plaintiff must show the damages resulting to him as a result of the violations of the antitrust laws. Elder-Beerman Stores Corp. v. Federated Department Stores, Inc., 459 F.2d 138, 148 (6th Cir. 1972). Plaintiff here claims damages in the amount of $50,000 which it claims is a proper measure of its lost revenue as a result of the decline of its share of the market in Sargent goods in the Chicago area. Plaintiff claims that prior to 1969, it enjoyed about 10% of the market (Ken Lee accounted for the remaining 90%). For the years 1969 to 1973, it is asserted that plaintiff's sales of Sargent goods declined to approximately 1% of the Chicago market as a result of the conspiracy. Even assuming that these percentage figures are accurate,[7] there is no evidence in the record as to why plaintiff's sales declined beginning in 1969, especially in light of the claim that the conspiracy had been in force since 1964.

Apparently, plaintiff became dissatisfied with Sargent as a result of the incidents described at trial, and began selling the Russwin brand of builders hardware in 1968. The record shows that in the very years in which plaintiff's sales of Sargent products declined, 1969-73, plaintiff's total sales of builders hard-

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7 The 10% figure is based upon a comparison of only two years' purchases by Mid-America of Sargent goods prior to 1969 since the record does not show Ken Lee's Sargent business for 1966 and 1967.

ware increased steadily. In fact, total sales for fiscal 1972 were higher than in any prior year it had been in business.

While the assessment of damages in such a case as this is by its very nature speculative and uncertain nonetheless there are reasonable standards of proof which a plaintiff must meet. Emich Motors Corp. v. General Motors Corp., 181 F.2d 70, 84 (7th Cir. 1950), rev'd on other grounds, 340 U.S. 558 (1951). The record before this court cannot sustain a finding of damages suffered by plaintiff as a result of any illegal actions by defendants.

V. Conclusion

In an action for treble damages under Section 4 of the Clayton Act, a plaintiff must establish the following elements of his case:

> "(1) That the defendant has violated the antitrust laws; (2) that plaintiff has suffered an injury to his business or property susceptible of being described with some degree of certainty in terms of money damages; and (3) that a causal connection exists between the defendant's wrongdoing and the plaintiff's loss. . . . Of course, a failure by the plaintiffs to prove any one of the three elements of their case would require a trial judge to direct a verdict for defendants."

Continental Ore Co. v. Union Carbide and Carbon Corp., 289 F.2d 86, 90 (9th Cir. 1961), rev'd on other grounds, 370 U.S. 690 (1962). In this case, plaintiff has failed to prove any of the requisite elements.

Accordingly, it is ordered that judgment be, and hereby is, entered for the defendants, and that the complaint be, and hereby is, dismissed.

ENTER:

BENJAMIN A. DECSEY

United States District Judge.

DATED: September 24, 1974.